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No. 77-1667

In the Supreme Court of the United States

OCTOBER TERM, 1978

DENNIS W. MULLIGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 2a-11a) is reported at 573 F.2d 775.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on April 3, 1978. The petition for a writ of certiorari was filed on May 3, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner was deprived of a fair trial by an impartial jury because of the alleged bias, misconduct, or incompetency of one of the jurors.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of making a false material declaration under oath to a grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to two years' imprisonment. The court of appeals affirmed (Pet. App. 2a-11a).

The government's evidence showed that petitioner, a New York City Police Detective, and others participated in the robbery of the New York Hospital Branch of the First National City Bank. The robbery was executed by Frank Smith, Martin Shannon and co-defendant Cerasani, while petitioner stood guard and drove the getaway car. Smith and Shannon were the government's chief witnesses at trial.

[1] Petitioner and co-defendant John Cerasani were charged with aggravated bank robbery, in violation of 18 U.S.C. 2113(d), and conspiracy to commit bank robbery, in violation of 18 U.S.C. 371. Petitioner was also charged with five counts of making false material declarations under oath to a grand jury in violation of 18 U.S.C. 1623. A previous trial on the bank robbery, conspiracy, and two false declaration counts resulted in a hung jury as to both defendants on all counts. On retrial, following two days of deliberation, petitioner was convicted of one of the two false declaration counts; the jury again disagreed on the remaining counts in respect to both him and his co-defendant (Pet. App. 3a).

The false declaration that formed the basis for petitioner's conviction under Section 1623 was his statement under oath to the grand jury that he did not recognize Cerasani's photograph, name, or nickname. Shannon and Smith testified that petitioner had plotted with them and Cerasani to rob the bank and had driven the getaway car containing the loot. Shannon also testified that petitioner divided the proceeds shortly after the robbery in his and Cerasani's presence. (Tr. 225-232, 640-643, 645-649). In addition, evidence showed that five months before petitioner's grand jury testimony, a two-minute phone call was placed from Cerasani's telephone to petitioner's on a day that petitioner was off duty (Tr. 489-495, 507-508; GX 41, 42, 45, 45A-45D).

Shortly after the verdict the district court received a letter (A. 77)[2] from one of the jurors, Mr. Yusef Bulos, stating, in substance, that he regretted having voted to convict petitioner of committing perjury before the grand jury, and that he and two or three other members of the jury had voted for conviction on the perjury count in the hope of persuading the rest of the jury to vote for acquittal on the other counts (Pet. App. 4a). The court forwarded the letter to counsel, and upon the government's motion, entered a protective order prohibiting the parties from communicating with any member of the jury (Tr. of June 28, 1977, p. 7).

Subsequently another juror, Virginia Stephenson sent a letter (A. 78-81) to the Assistant United

[2] "A." refers to the appendix in the court of appeals.

States Attorney who had represented the government at trial. The Assistant immediately furnished copies of the letter to defense counsel and the court (A. 123). In the letter, Stephenson stated that on one occasion the jurors had voted eleven to one for acquittal, she being the only holdout. She also expressed her thrill at having participated in the trial, her admiration for both the prosecutor and the judge, her restored faith in the judicial system, and her satisfaction with the verdict. She also stated that she had begun to write a book that would be a fictional portrayal of the witness Smith and asked for assistance in obtaining transcripts of Smith's testimony at prior trials.

After counsel for petitioner received a copy of the letter, they investigated further into Stephenson's background. They discovered that in 1973 she had a dispute with a United States Postal Service employee. Angered because postal trucks were being parked near her apartment with their motors running, she went to the post office to complain. On the way, she got into an argument with the employee and struck him with a ball-point pen, inflicting a minor laceration. She was arrested by the New York City Police and charged with felonious assault, after which she was fingerprinted and held overnight for arraignment on the following day. The next day she was released on her own recognizance, and the criminal charges were subsequently dismissed. The postal employee later brought a civil suit against her and recovered compensation for his injury (Pet. App. 4a-5a).

Because Stephenson had denied on *voir dire* that she had had any disputes with the United States or that she had "ever been involved in a criminal case," petitioner moved for a new trial. He argued that Stephenson had perjured herself during *voir dire* and that, as a result of the undisclosed incident, she must have become biased against New York City policemen. He also contended that her letter showed that she had mental and emotional problems which prevented her from performing her duty as a juror (Pet. App. 5a).

At a hearing on petitioner's motion, Stephenson explained to the court that after her alleged assault on the post office employee she had spent the night in jail and had been arraigned the next morning on a felony-assault charge, which was later reduced to a misdemeanor charge and then dismissed on the motion of the District Attorney when the complaining witness failed to appear for trial (A. 242-245). Under a provision of state law then in effect, she moved for and obtained return of all photographs and fingerprints taken upon her arrest (A. 145-146, 182-183, 245-247). She also stated that her attorney had advised her that, because charges were dropped, she could honestly deny having been involved in a criminal case or having been arrested (A. 144). She also denied having any grudge against the police department because of her arrest (A. 146-147). Although she had testified during the civil trial that she had been chased and punched in the stomach by

the postal employee, she testified during the hearing in the instant case that she did not regard herself as having been the victim of a crime through these events (Pet. 7; A. 149).

The court found that the juror's *voir dire* answer had not been perjurious but instead was based on a good-faith belief that she was entitled to treat the prior criminal case as a nullity, that she did not possess and was not concealing any animus against petitioner, and that there was no showing that petitioner had been prejudiced even if the *voir dire* answer were assumed to be deliberately false (A. 154-155).[3]

ARGUMENT

This case involves the application of settled principles of law to the particular facts. The district court resolved the relevant factual issues against petitioner, and the court of appeals correctly held that the district court's factual determinations were not clearly erroneous. That conclusion does not warrant this Court's review.

Petitioner contends that the verdict should be set aside because (1) he would have peremptorily challenged Juror Stephenson if he had known about her prior involvement with the police (Pet. 9-11), (2) Juror Stephenson "willfully concealed her prior experiences with the police" during *voir dire* (Pet. 12-16), and (3) events during and after the trial demonstrated that Juror Stephenson was biased and mentally incompetent (Pet. 16-22). The first contention is based on an erroneous legal premise, and the second and third are factual contentions that the district court resolved against petitioner.

1. A defendant is not entitled to have a verdict set aside merely because facts come to light after trial that might have, or even probably would have, led the defendant to challenge the juror before trial had he known of them at the time. In view of the strong public interest in the finality of verdicts and the need to prevent endless litigation and harassment of jurors, attacks upon a verdict after trial are permitted only on limited grounds and in exceptional circumstances.[4] One of the grounds that courts have recognized is proof that a juror lied to a material question on *voir dire* and that the defendant was thereby prejudiced. See, *e.g.*, *Turner* v. *United States*, 416 F.2d 815, 817 (C.A.D.C.); *Marshall* v. *United States*, 355 F.2d 999, 1009 (C.A. 9), certiorari denied, 385 U.S. 815; *United States* v. *Baker*, 266 F.

[3] After the judge's ruling, petitioner received permission to call the lawyer who represented Stephenson during the proceedings against her. The lawyer stated he recalled helping her get her fingerprints back from the police after the charge was dropped and, although he did not recall the specific advice he gave her on the subject of her arrest, he stated that the conversation which she described "certainly could have taken place" (A. 180-182). Following this testimony, the judge reaffirmed his ruling on petitioner's motion for a new trial (A. 197-198).

[4] The same considerations of public policy have led the courts to recognize a strong presumption that juries are impartial and to impose the burden of proving bias or prejudice on the party attacking the verdict. See *Irvin* v. *Dowd*, 366 U.S. 717, 723; *Stein* v. *New York*, 346 U.S. 156, 178; *Mikus* v. *United States*, 433 F.2d 719, 723 (C.A. 2).

Supp. 461, 462-463 (D. D.C.), remanded on other grounds, 401 F.2d 958 (C.A.D.C.).[5] But in the absence of such proof, the courts have properly declined to set aside verdicts on the basis of subsequently uncovered evidence that might have led to striking the juror, unless the evidence is of such a character as to compel the presumption of bias or unfitness. See, *e.g.*, *United States* v. *Robbins*, 500 F.2d 650, 653, n. 6 (C.A. 5); *Williams* v. *United States*, 418 F.2d 372, 377 (C.A. 10); *Jackson* v. *United States*, 408 F.2d 306, 308-309 (C.A. 9); *DeRosier* v. *United States*, 407 F.2d 959, 963 (C.A. 8); *Ryan* v. *United States*, 191 F.2d 779, 780 (C.A. D.C.), certiorari denied *sub nom. Duncan* v. *United States*, 342 U.S. 928. And the trial court is properly vested with broad discretion in determining whether the juror lied and whether the information is sufficiently indicative of prejudice or unfitness to warrant a new trial. 3 Weinstein's *Evidence* ¶ 606[04] (1977);[6] see *Irvin* v. *Dowd*, 366 U.S. 717, 723.

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[5] Other grounds include proof that "extraneous prejudicial information was improperly brought to the jury's attention" or that "outside influence was improperly brought to bear upon any juror" (Fed. R. Evid. 606(b)), or evidence clearly showing that a juror was mentally incompetent. Cf. *United States* v. *Dioguardi*, 492 F.2d 70, 80-81 (C.A. 2), certiorari denied, 419 U.S. 873. See discussion, *infra*, pp. 11-12.

[6] Petitioner relies (Pet. 9-12) on *Jackson* v. *United States*, 395 F.2d 615 (C.A.D.C.), and *Carpenter* v. *United States*, 100 F.2d 716, 717 (C.A.D.C.), but those cases are inapposite. In *Jackson* the defendant was charged with murdering his former wife and assaulting her lover. After conviction it was discovered that one of the jurors had been recently involved in a very similar situation as the alleged lover of a murdered woman. The court of appeals ordered a new trial on the ground that the presumption of prejudice was "manifest" (395 F.2d at 617), even though the matter had not been explored on *voir dire*. The court did not suggest that a new trial is required whenever information is subsequently disclosed that would probably have led the defense to challenge the juror, and subsequent decisions of the District of Columbia Circuit have rejected such a rule. See, *e.g.*, *Turner* v. *United States*, *supra*.

Carpenter, far from supporting petitioner's claim, stands for precisely the opposite proposition. There it was discovered that a juror had previously known defense counsel, contrary to his statement on *voir dire*. The district court denied a new trial motion on the ground that the juror had not recognized counsel at *voir dire* and therefore did not purposefully conceal the fact. The court of appeals affirmed, stating (100 F.2d at 717; emphasis supplied): "[I]f [a juror] *conceals* a material fact which, if disclosed, would probably have induced counsel to strike him from the jury, a new trial should ordinarily be ordered." Without proof of willful concealment, however, a new trial should not be ordered in the absence of manifest prejudice.

2. Petitioner's claim that Juror Stephenson "willfully concealed her prior experiences with the police" was specifically rejected by the district court, and the court's determination was not clearly erroneous. The experience in question occurred four years prior to trial; the criminal charges against Stephenson were dismissed shortly thereafter; and the court credited her testimony that her lawyer had advised her that she could treat the criminal case and the arrest as a nullity, and did so specifically with reference to jury duty (Pet. App. 5a). Moreover, contrary to petitioner's suggestion (Pet. 8), her lawyer did not undermine that claim; he specifically stated that the

conversation Stephenson described "certainly could have taken place" (Pet. App. 6a).

The district court also found that Stephenson's prior experience did not establish such potential for prejudice as to require a new trial. That finding was based on Stephenson's statements, which the court credited, that she had "no grudge against the Police Department whatsoever" and did not conceal any animus against any party in order to get on the jury (Pet. App. 6a). That finding was not clearly erroneous.[7]

3. Finally, petitioner errs in contending that events during and after trial, particularly Stephenson's letter, indicate a preexisting bias or mental incompetence under 28 U.S.C. 1865(b)(4)[8] that deprived him of a fair trial. First, it should be noted that the evidence offered by petitioner to show such alleged bias, incompetence and resulting prejudice to the defense (*i.e.*, Stephenson's letter and the letter from Juror Bulos to the effect that the verdict was a compromise) is inadmissible under well settled prin-

[7] Contrary to petitioner's contentions (Pet. 12-16), the fact that Stephenson did not disclose her prior experience does not support the inference of bias against petitioner. The incident was removed in time and nothing about it would suggest that it implanted an indelible animosity against any or all police officers. Indeed, as the district court and court of appeals noted (Pet. App. 8a), if the experience would warrant any inference of bias, it would be a bias against the prosecution, not against a criminal defendant.

[8] 28 U.S.C. 1865(b)(4) authorizes the district court to deem any juror qualified unless, *inter alia*, the juror "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service."

ciples now codified in Fed. R. Evid. 606(b).[9] See also *Stein* v. *New York*, 346 U.S. 156, 178. But even assuming the admissibility of that evidence, it does not support petitioner's claim. The post-trial letter, indicating that juror Stephenson was favorably impressed by the prosecutor during trial and wished to write a book about her experience as a juror, is not indicating that Juror Stephenson was favorably imtrial began. The court of appeals also correctly held (Pet. App. 8a) that the letter fell "far short" of establishing incapacitating mental and emotional instability on her part. As the Second Circuit stated in respect to similar claims in *United States* v. *Dioguardi*, 492 F.2d 70, 78-80, certiorari denied, 419 U.S. 873, where a juror wrote an emotional letter to the defendant after trial in which the juror claimed clairvoyant powers:

> It is well settled that only clear evidence of a juror's incompetence to understand the issues and to deliberate at the time of his service requires setting aside a verdict. And only strong

[9] Rule 606(b) prohibits evidence of "any matter or statement occurring during the course of the jury's deliberations or * * * the effect of anything upon * * * any * * * juror's mind or emotions as influencing [a juror] to assent to or dissent from the verdict * * * or concerning his mental processes in connection therewith * * *." As an exception, Rule 606(b) admits evidence of "extraneous prejudicial information * * * improperly brought to the jury's attention" and evidence of "outside influence * * * improperly brought to bear upon any juror." The Stephenson and Bulos letters do not concern "extraneous information" of "outside influence"; rather they concern only the mental processes of the jurors in reaching the verdict.

evidence that it is likely that the juror suffered from such incompetence during jury service will justify an inquiry into whether such incompetence in fact did exist. * * *

* * * * *

With respect to post-verdict evidence of possible juror incompetency during the trial, courts have refused to set aside a verdict, or even to make further inquiry, unless there be proof of an adjudication of insanity or mental incompetence closely in advance of the time of jury service. Only when proof of this nature has been offered, or proof of a closely contemporaneous and independent posttrial adjudication of incompetency, have courts conducted hearings to determine whether the disability in fact affected the juror at the time of trial.

But absent such substantial if not wholly conclusive evidence of incompetency, courts have been unwilling to subject a juror to a hearing on his mental condition merely on the allegations and opinions of a losing party. [Footnotes omitted.]

Similarly, as the court of appeals noted (Pet. App. 8a), the indication in the letters that the jurors might have reached a compromise verdict does not warrant the granting of a new trial. *Stein* v. *New York*, *supra*, 346 U.S. at 178; *United States* v. *Green*, 523 F.2d 229, 235-236 (C.A. 2), certiorari denied, 423 U.S. 1074; *United States* v. *Grieco*, 261 F.2d 414 (C.A. 2), certiorari denied, 359 U.S. 907.[10]

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[10] Petitioner's further claim (Pet. 20-22) that the hearing before the trial judge was not complete because the judge refused to allow petitioner's counsel to conduct the juror's interrogation and declined to inquire into broad areas proposed by petitioner ignores the settled principle that a post-trial interrogation such as that involved here should be conducted by the court and not by counsel. *United States* v. *Brasco*, 516 F.2d 816, 819 n. 4 (C.A. 2), certiorari denied, 423 U.S. 860. Moreover, the broad additional areas of inquiry proposed by petitioner had no direct bearing on the juror's testimony, since she already had explained her reason for not volunteering information about the arrest. There clearly was no abuse of the trial court's recognized discretion to limit questioning, and none of the cases relied upon by petitioner (Pet. 20-21) suggests the contrary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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